Supreme Court, U.S.
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In the
Supreme Court of the United States

HERMINIA AREVALOS-ALFARO,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Immigration Judge's purported misapplication of law to the undisputed facts of a discretionary decision can create a colorable claim to due process ultimately creating a inherent statutory conflict in terms of jurisdiction?

   A. Whether the Immigration Judge's decision in the present case exemplified this purported conflict?

2. Whether the Board of Immigration Appeals streamlining procedure is in offense of an alien immigrant's right to due process under the Fifth Amendment to the Constitution of the United States?

3. Whether the Board of Immigration Appeals streamlining procedure's application to Petitioner, as affirmed by the United States Court of Appeals for the Ninth Circuit in accordance with Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003), violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States?

4. Whether the Ninth Circuit's dismissal of Petitioner's petition for direct review for lack of jurisdiction in lieu of a valid equal protection argument demonstrates the decision was wrongly decided?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Hermina Arevalos-Alfaro ("Petitioner" or "Ms. Arevalos") respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW[1]

The United States Court of Appeals for the Ninth Circuit dismissed the preceding petition for direct review for lack of jurisdiction in part on September 27, 2006. (Appendix[2] "A", *infra*, 1a-2a.) On March 27, 2006, the Board of Immigration Appeals ("BIA") in the United States Department of Justice's Executive Office of Immigration Review (App. "B", *infra*, 3a-4a), affirmed the opinion the decision of the Immigration Judge (App. "C", *infra*, 5a-15a) originally entered on June 22, 2005.

JURISDICTION

As stated above, the court of appeals entered its final judgment for docket number 06-72035 on September 27, 2006 (App. "A", *infra*, 1a-2a) in an unreported decision and order. The preceding petition for review invoked the jurisdiction of the court of appeals under 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13,

[1] The procedural history in the present case is long and complex as will be explained below. Only the most recent three decisions are stated in this section.

[2] "Appendix" will hereinafter be referred to as "App.".

Div. B, 119 Stat. 231 (May 11, 2005). The instant petition for writ of certiorari invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

INA § 240A(b), 8 U.S.C. § 1229b(b) reads, in pertinent part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien an alien who is inadmissible or deportable from the United States if the alien–...
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2) or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Moreover, 8 U.S.C. § 1252(a)(2)(B)[3], subtitled "[d]enials of discretionary relief", reads "no court shall have jurisdiction to review...any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 USCS §§ 1182(h), 1182(i), 1229b, 1229c, or 1255." Despite this seemingly limitless jurisdictional bar for specific discretionary decisions, 8 U.S.C. § 1252(a)(2)(D), as amended by the REAL ID Act of 2005, 109 P.L. 13; 119 Stat. 231, Section 106(a) reads:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In addition, Section 101(a)(47) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(47) established *both* that persons in removal proceedings have a right to an administrative appeal and also that the Board of Immigration Appeals is the final adjudicator in the administrative appeals process.

STATEMENT OF THE CASE

The application of the sections for relief from removal proceedings contained in the Immigration and Nationality Act ("INA"), and the appellate review of such relief applications,

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[3] This subsection pertains specifically to the federal court's jurisdiction to review decisions originating with the Immigration Court under 8 U.S.C. § 1229b(b).

affects thousands of immigrants each year in their quest to remain lawfully in the United States. The recently-passed REAL ID Act of 2005 vests exclusive jurisdiction with the federal circuit courts over constitutional questions of due process arising from INA's application to an alien applying for relief. As a result of the federal circuits below, whom apparently vary on whether issues of application of law to fact can or cannot raise a colorable due process claim, there is an inherent conflict in the interpretation and application of the jurisdictional portions of the INA.

A. PETITIONER'S IMMIGRATION AND FAMILY STATUS

Petitioner is a 56-year-old native and citizen of Mexico who first entered this country on or about September of 1991, and has resided here continuously ever since. Ms. Arevalos has twelve (12) children, two (2) of which currently reside with her including a nine (9) year-old U.S. citizen ("USC"), Michael Perez Arevalos. In general, Petitioner has maintained a stellar and consistent work record in the United States since entering this country, and suffered no criminal convictions or immigration violations other than those contained in the Notice to Appear ("NTA").

Since the inception of the original removal proceeding, Petitioner's USC son, Michael Arevalos, has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADD"). (App. "C", *infra*, 6a) This condition requires constant medical treatment including extensive therapy and medication. The severity of this condition is evident in the fact that Michael's elementary school has had to hold him back from advancing to 6th grade. This condition is definitely treatable, but only with the program in which he is currently involved with. Prior to the diagnosis of this condition, the severity of

such condition manifested itself in her son's attempt to commit suicide.

B. PROCEEDINGS BELOW

On June 10, 2002, the Government served Petitioner with an NTA alleging that she was removable under Immigration and Nationality Act ("INA") Section 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) or being present in the United States without proper admission. On August 21, 2002, Ms. Arevalos, through counsel, filed a Prehearing Statement and Motion to Terminate based on Equal Protection grounds because she was arrested by the U.S. Border Patrol based on her ethnic appearance. That motion was denied on September 5, 2002 by Immigration Judge ("IJ") Kenneth A. Bagley. (App. "D", *infra*, 16a-18a)

On March 31, 2003, Judge Bagley denied Petitioner cancellation of removal relief under INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1). In denying relief, the IJ relied on the legal standard pronounced by the BIA in In re Monreal, 23 I&N Dec. 56 (BIA 2001), that an applicant for cancellation of removal must demonstrate hardship beyond that which has historically been required in suspension of deportation cases involving the "extreme hardship" standard, although that hardship need not be "unconscionable." Furthermore, the IJ relied on the Board's legal standards put forth in Matter of Andazola-Rivas, 23 I&N Dec. 319 and Matter of Anderson, 16 I&N Dec. 596 (BIA 1978) to deny relief.

Petitioner then timely appealed the IJ's decision arguing: (1) Ms. Arevalos's arrest violated her Constitutional rights to equal protection of the law; (2) the IJ committed reversible legal error by failing to take into consideration the controlling decision by the BIA in Matter of Recinas, 23 I&N Dec. 467

(BIA 2002); and (3) under the legal standard at of the Recinas decision, Ms. Arevalos' USC child would suffer "exceptional and extremely unusual hardship" if she were removed to Mexico. On May 25, 2004, the BIA affirmed the IJ's ruling without any articulation of reasoning.

Since the inception of the case, Petitioner's USC child experienced a material change in circumstances not available at the original proceedings. Petitioner filed a timely motion to reopen based on such changed circumstances, and on September 28, 2004, the BIA granted the motion and remanded the case to the Immigration Court in light of the newly acquired hardships. (App. "E", *infra*, 19a-20a.) On June 22, 2005 before the IJ on remand, Petitioner was again denied cancellation of removal and granted voluntary departure. (App. "C", *infra*, 14a-15a.) Petitioner again timely appealed to the BIA, and was denied on March 27, 2006 without any articulation of reasoning. (App. "B", *infra*, 3a-4a.) Petitioner then timely filed a petition for direct review with the Ninth Circuit Court of Appeals, which was denied for lack of jurisdiction[4] on September 27, 2006. (App. "A", *infra*, 1a-2a)

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[4] Petitioner's petition for direct review never made it to the briefing schedule and was denied on motion of the Government.

REASONS FOR GRANTING THE PETITION

I. IN THAT THE REAL ID ACT OF 2005 VESTED JURISDICTION EXCLUSIVELY WITH THE CIRCUIT COURTS OVER CLAIMS OF DUE PROCESS VIOLATIONS, CONFLICT INEVITABLY EXISTS BETWEEN SUCH STATUTE AND VARYING CIRCUIT PRECEDENT BELOW BECAUSE OF THE GENERAL NOTION THAT A PURE APPLICATION OF LAW TO FACTS CREATES A COLORABLE CLAIM TO DUE PROCESS.

One of the primary issues presented by the denial by the Ninth Circuit in the present case is whether a purported "misapplication of case law" can sufficiently raise a colorable due process claim. (App. "A", *infra*, 1a-2a.) The Ninth Circuit determined that despite Petitioner's arguments that the IJ misapplied the relevant legal standards to the undisputed facts related to Petitioner's cancellation of removal application and Petitioner's equal protection argument, the ultimate decision was discretionary and therefore was not subject to review. (App. "A", *infra*, 1a-2a.) The apparent thrust of the Ninth Circuit's decision stems from it's own precedent Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001) which finds that "misapplication of case law" can *never* sufficiently raise a colorable due process claim. (App. "A", *infra*, 1a [further citing Ramirez-Perez v. Ashcroft, 336 F.3d 1001 (9th Cir. 2003)].) What is more, the Ninth Circuit relied on Romero-Torres v. Ashcroft, 327 F.3d 887 (9th Cir. 2003). (App. "A", *infra*, 1a-2a.)

Notwithstanding the jurisdiction-stripping provisions for cases involving denials based on hardship determinations the Ninth Circuit referred to in its aforementioned dismissal, the

Third Circuit Court of Appeals has determined "*issues of application of law to fact*, where the facts are *undisputed* and *not the subject of challenge*" *can* raise a colorable claim for due process sufficient for review per 8 U.S.C. § 1252(a)(2)(D). Kamara v. AG of the United States[5], 420 F.3d 202, 211 (3d Cir. 2005) (citing Bakhtriger v. Elwood, 360 F.3d 414, 420 (3d Cir. 2004), Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3d Cir. 2003)). This is relevant and an essential reason for granting the instant petition when considering the legal standards an IJ uses in the hardship determination under U.S.C. § 1229b(b). In the present case, the IJ, as affirmed by the BIA on two occasions, extracted legal standards from BIA precedent in Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), Matter of Andazola-Rivas, 23 I&N Dec. 319, and Matter of Anderson, 16 I&N Dec. 596 (BIA 1978) to deny Petitioner relief. It is apparent the IJ and BIA were therefore "extracting pure legal standards" in denying Petitioner relief. See Hernandez v. Ashcroft, 345 F.3d 824, (citing Kalaw v. INS, 133 F.3d 1147, 1150-52 (9th Cir. 1997). What is more, *neither* the BIA nor the IJ used, or even mentioned for that matter, the proper legal standard in Matter of Recinas, 23 I&N Dec. 467 (BIA 2002) which Petitioner repeatedly cited and relied on in requesting an obvious "case-by-case" analysis.

In brief, it is reasonable to conclude the IJ was applying pure legal and evidentiary standards to the undisputed facts of Petitioner's application for cancellation of removal as related

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[5] Although the Third Circuit's analysis in Kamara technically was in the habeas corpus context under 28 U.S.C. § 2241, such analysis should apply in the non-habeas context as here because the REAL ID Act's transfer of all habeas petitions to the circuit courts. See REAL ID Act of 2005, 109 P.L. 13; 119 Stat. 231, Section 106(c).

to the hardship determination. This is relevant to the current petition because the Third Circuit's holding in Kamara suggests an misapplication of law to undisputed facts *can* constitute a colorable claim to a due process violation. As described above, a due process violation unquestionably vests the circuit courts of appeal with jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) . However, in this scenario, which is certainly plausible based on the foregoing reasoning, such would conflict with the jurisdictional bar under 8 U.S.C. § 1252(a)(2)(B). It should be further noted the Kamara holding suggests a precedent conflict with the Ninth Circuit's holding in Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001) which determined that "misapplication of case law" may not be reviewed. These conflicts underscore the importance of granting the current petition.

A. *MATTER OF RECINAS* AS A FURTHER LEGAL STANDARD THE IMMIGRATION JUDGE IS REQUIRED TO ABIDE BY IN THE HARDSHIP DETERMINATION.

In the context of the IJ's denial on both occasions, Petitioner contended the IJ failed to take another controlling legal and evidentiary standard from BIA precedent, namely Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), into the hardship determination. In Recinas, the BIA emphasized the alien was a single mother who would have the heavy burden of providing the sole financial and familial support for her children if she was deported to Mexico. Matter of Recinas, 23 I&N Dec. 467, 470 (BIA 2002). The BIA premised the "exceptional and extremely unusual hardship" element as NOT needing to be "unconscionable." Id. The fact that the alien was the ***sole support*** for her children "increases the hardship the children would face upon a return to Mexico, as they would be completely dependent on their's mother ability,

not only to find adequate employment and housing, but also to provide for their emotional needs." Matter of Recinas, 23 I&N Dec. 467 at 470.

In connection, the Board noted that the alien's children had difficulty speaking Spanish and could neither read nor write Spanish. Id. In addition, the fact that Recinas' USC children had spent their ***entire lives*** in the United States was extremely relevant because it demonstrated "they knew no other way of life." Matter of Recinas, 23 I&N Dec. 467 at 470. As the alien in Recinas had no "close relatives remaining in Mexico," the BIA found the hardship extolled on the family unit upon a forced return to Mexico would be extremely detrimental. Id. The reasoning was that "the respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help." Id. Furthermore, the Board noted that the alien lacked the availability of an alternative means of immigrating to this country. Recinas, 23 I&N at 470-72. The BIA held that "these critical factors *distinguish* her case." Id. (emphasis added).

B. THE IJ'S MISAPPLICATION, OR IGNORANCE ALL TOGETHER, OF *MATTER OF RECINAS* TO THE UNDISPUTED FACTS OF PETITIONER'S CASE (INCLUDING A MATERIAL CHANGE IN CIRCUMSTANCES) GIVES RISE TO A COLORABLE CLAIM TO DUE PROCESS AND A DEMONSTRATION THE DECISION BELOW IS WRONGLY DECIDED.

Unlike the children in Monreal and identical to the children in Recinas, Ms. Arevalos's case presents a unique set of hardships that her children will suffer if she is removed to Mexico. Ms. Arevalos is a single mother who provides the

sole financial support to the three children that live with her. She has earned a living for the past six years through the recycling program implemented in California, coupled with receiving some public financial assistance (AFDC) since 1994. Although her U.S. citizen son's father pays $50 per month in child support, this limited amount is not voluntarily paid directly to her but through a government program. Furthermore, although the child has contact with his father on Saturdays, there is resentment directed toward the child from his father's wife making the child unwelcome in his father's house.

Also, although Ms. Arevalos has family members who live in Mexico, they are extremely impoverished and cannot provide the financial support Ms. Arevalos would need if she were to be removed. Also, Ms. Arevalos's U.S. citizen son cannot read or write in Spanish and has only a limited Spanish speaking capability. In addition, without treatment he is receiving in the United States, his learning disorder will continue to worsen thus retarding his mental growth on a permanent basis. He is unfamiliar with Mexico and has developed strong ties with the community through his daily involvement at Boys and Girls Club in El Cajon, CA. At the Boys and Girls Club, he plays basketball, football and uses the computing facilities. Ms. Arevalos herself has been active with her U.S. citizen son's endeavors by volunteering her time at his school.

In addition, her U.S. citizen son suffers from sinus allergies and requires daily medication because he has trouble breathing properly, especially at night. The cost of the medication is paid by social services program Medi-Cal because Ms. Arevalos cannot afford it. Note that Ms. Arevalos testified that one of her children died as a result of malnutrition when she lived in Mexico in 1985. Clearly there

exists a strong likelihood of a similar tragedy if Ms. Arevalos is removed because she will be unable to afford, and none of her relatives in Mexico will be able to help her procure, the medications necessary for her U.S. citizen son to breathe properly. This situation is obviously truly grave in nature.

In addition, Petitioner provided unquestioned documentary evidence that her child had been diagnosed with the severe learning disorder Attention Deficit Hyperactivity Disorder ("ADHD") on August 9, 2004. (App. "C", *infra*, 6a.) Michael's doctor provided further documentation that his condition had improved with proper treatment, including psychotherapy, and most importantly recommended "I believe it is important Michael's *present support system and professional services remain stable and consistent...disruption in this support system would be detrimental to Michael's welfare.*" (App. "C", *infra*, 7a-8a.) This medical diagnosis goes to the heart of the hardship Petitioner's son would face if he we ripped from the United States.

In addition, Petitioner submitted evidence that such prognosis is "lifelong" and more importantly that such treatment "could not be duplicated in Mexico..." (App. "C", *infra*, 8a.) As a result of this condition, Petitioner's son has been held back a year in school and has "below basic" scores on California standardized tests. (App. "C", *infra*, 8a.) For this problem, Petitioner testified that her son received medication for which she cannot pay by herself without the aid of MediCal.

However, despite the dearth of medical documentation specifically diagnosing Petitioner's son's condition, the necessary treatment he is receiving in the United States, and that fact that no such treatment exists in Mexico, the IJ oddly was still "baffled by this case." (App. "C", *infra*, 12a.) The

IJ apparently had a problem with the notion that Petitioner had not previously developed her son's problems through testimony before the court back in 2003. (App. "C", *infra*, 12a.) This statement *grossly* overlooks the entire point of the motion to reopen in that such evidence was *previously unavailable* at the prior hearing.

In relation, Petitioner reasonably explained that despite the signs of ADHD appearing from the time Michael was in second grade, which would have been before the prior hearing, she did not explain such to the IJ simply because she *did not know what, if anything, was wrong with her child.* Moreover, if the IJ had given proper deference to the legitimate documentation provided, he would have focused on the fact that Michael's diagnosis did not come until August of 2004, which is *well after* Petitioner's first hearing on March 31, 2003. By placing so much emphasis on this alleged illogical discrepancy, it is almost as if the IJ is faulting Petitioner for not having her son diagnosed earlier, which entirely misses the point of the burden of proof that lies within INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D). Secondly, the IJ seems to emphasize that Petitioner has difficulties pronouncing the medication Michael takes. (App. "C", *infra*, 9a.). *Nowhere* in the regulations defining INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) or binding precedent thereafter has a court held an alien to not qualify for relief due to lack of early diagnosis and proper pronunciation of medication as the IJ would have it here.

Moreover, the IJ further extends his irrational ignorance of the plethora of legitimate documentation in essentially playing the role of a psychotherapist in finding that since Petitioner's recent divorce, "at least one of the factors exacerbating the child's ADHD condition" has disappeared. (App. "C", *infra*, 12a.) The IJ appears to be suggesting that

such divorce has somehow provided a psycho-therapeutic remedy that will undoubtedly lessen the hardship Petitioner's son will face. If such logic is not faulty on its face, it most surely is when considering the medical documentation which clearly calls for continued treatment and an non-interruption of his current support system as described above. One would have to assume these issues (i.e. the divorce) have been addressed in Michael's psychotherapy sessions, and to irrationally augment the medical professional's diagnosis, when the IJ himself clearly has no medical expertise, is to further compound the abuse of discretion. It is simply not within the purview of the IJ to determine, on an independent basis, what medical treatments are working in treating Petitioner's son in relation to extenuating circumstances such as a divorce.

The IJ also failed to make any mention that prior to the treatment Michael is receiving, his condition has worsened to the point that he wanted to kill himself, and he in fact made a veiled attempt. Also, despite the IJ's unfounded concerns of Petitioner's inability to pronounce her son's medication, he overlooked that Petitioner was able to describe the exact dosage and effective period in terms of the strength of each medicine. This evidence, taken in the aggregate, clearly should have demonstrated that Petitioner carried her burden of proof in terms of the extreme and exceptionally unusual hardships Michael would face if he left the United States and went to Mexico upon a forced return of his mother per the requirement in INA § 240A(b)(1)(D). For the IJ to irrationally ignore such evidence and to fail to take into account the reasoned discrepancies in the record as described above constitutes an abuse of discretion.

Therefore, per the "cumulative analysis" of hardship factors in Recinas, the heavy financial and familial burden on

Petitioner, the lack of availability of familial financial support in Mexico, the USC children's unfamiliarity with the Spanish language, and the lack of available alternate methods of immigrating is well beyond the hardship that "is normally experienced in most cases of removal." Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). This is relevant to the conflict cited above because Petitioner's presentation of this argument lays a proper foundation for whether the IJ misapplied the relevant *legal and evidentiary* standards in the hardship determination. According to the logic of the Kamara case from the Third Circuit , Petitioner could ultimately present a meritorious due process violation for misapplication of law to the undisputed facts of the case. As such, the holding below illustrates the statutory and precedent conflict described above while further suggesting such decision was wrongly decided.

II. THE DIFFERING STANDARDS FOR HARMLESS ERROR AMONG THE CIRCUITS CAUSE FEDERAL REVIEW OF THE BIA'S STREAMLINING REGULATIONS TO BE INCONSISTENT ULTIMATELY LEADING TO UNEQUAL TREATMENT FOR ALIENS DEPENDING ON GEOGRAPHICAL LOCATION.

The BIA's streamlining regulation, otherwise known as affirmance without opinion ("AWO"), is a three-sentence decision by a single Board Member that affirms, without any explanation, the results of the decision reached by an IJ in a case. See 8 C.F.R. § 3.1(e)(4) (September 25, 2002). An AWO decision indicates that the Board member agrees with the result reached by the IJ, but does not necessarily indicate agreement with the IJ's reasons for reaching that result. See 8 C.F.R. § 3.1(e)(4)(ii). A Board member is authorized to use the AWO procedure only if the case satisfies the

requirements for such a decision which are set out in the regulations. See 8 C.F.R. § 3.1(e)(4)(i).

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy all of the required criteria, then the single Board Member has the authority to issue a brief order affirming, modifying, or remanding the case. 8 C.F.R. § 3.1(e)(5). Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. In very limited circumstances, the case will be reassigned to a three-Member panel of the Board. Id.; 8 C.F.R. § 3.1(e)(6). Three-Member panels of the Board will truly become the exception, rather than the predominant method for deciding cases.

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is *prohibited* by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain only the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 CFR 3.1(e)(4).

Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy both of the

requirements listed in sections (a) and (b) below, and one of the two alternate requirements listed in section (c):

> a. the result reached by the IJ must be correct; and
> b. any errors in the decision below must be *harmless or nonmaterial* (emphasis added); and either
> c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent and cannot involve the application of precedent to a novel fact situation; or
> (ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of ~~a~~ written opinion in the case."

As indicated above, determining "harmless error" is essential to the BIA's use of the AWO procedure. Unfortunately, the standard for harmless error varies somewhat in different federal circuits. See Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); Podio v. INS, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); Perez-Lastor v. INS, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); Colemenar v. INS, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing"). Moreover, several errors - each of which alone might be harmless - can have a combined effect that is prejudicial. See, e.g., Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

Therefore, as the definition of "harmless error" varies across the judicial circuits, there is room for disparate treatment of aliens geographically in respect to when the BIA

is to use the AWO procedures depending on the circuit the case originates. More importantly, such disparate treatment in the application of immigration laws is in direct conflict with Congress' intended mission in creation of the BIA which "is to provide fair and timely immigration adjudications and authoritative guidance and *uniformity in the interpretation of the immigration laws*." Casas-Chavez v. INS, 300 F.3d 1088, 1092 (9th Cir., 2002)(quoting 64 FR 56135-01, 56136 [1999])(emphasis added). The Second Circuit has supported this contention in holding that the *interests of uniformity in interpretation of immigration law* should outweigh the interests of a circuit's precedence. See Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir., 2000)(emphasis added). This apparent conflict merits a proper review before this Court.

A. THE QUESTION PRESENTED HERE IS EQUALLY IMPORTANT.

i. THE VARIOUS CIRCUITS HAVE CONSISTENTLY HELD THAT AN ALIEN IS ENTITLED TO A REASONED DECISION BY THE BIA.

This Court has specifically held that an agency, such as the BIA, is required to explain the reasons behind a decision. SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1946) (calling the requirement a "fundamental rule of administrative law") see also Guentchev v. INS, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a "norm of administrative law"). In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a "right to a reasoned administrative decision." Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999).

Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. See, e.g., Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994)(quoting Turri v. INS, 997 F.2d 1306, 1310 (10th Cir. 1993) [noting that Board has an obligation to "articulate a reasoned basis for its decision"]); Mousa v. INS, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and "give careful, individualized, rational explanations for its decisions"); Guentchev v. INS, 77 F.3d at 1038 (citation omitted) (Board "must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted"); Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a 'comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner's case received individualized attention"); Vargas v. INS, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) ("Board's decision stands or falls on its express findings and reasoning"); Tukhowinich v. INS, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).

The Ninth Circuit, where this case originated, has specifically held "we do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995). The Ninth Circuit continued in that the "BIA's decision must contain a statement of reasons for denying petitioner relief adequate for us to conduct our review." Id.

As discussed above, the three sentence AWO decision does not contain any reasons or explanation as to why the

decision was reached. To complicate matter, such a decision fails to even reach the "boilerplate" decision the Ninth Circuit clearly frowns upon. See Ghaly v. INS, supra. The BIA's AWO therefore procedure stands in direct conflict to the various circuits' holding that an alien, at minimum, is entitled to a cogent and decipherable decision by the BIA. This clear conflict stresses the importance for review before this court.

ii. THE AWO PROCEDURE IS FUNDAMENTALLY FLAWED AND DEPRIVES AN ALIEN OF ADEQUATE REVIEW IN THE AGENCY SPECIFICALLY CREATED BY CONGRESS FOR ADJUDICATION OF HIS OR HER IMMIGRATION CASE.

Many of the circuit courts which have ruled on the AWO procedure have taken great effort to comment on such procedure's fallible nature. The First Circuit Court of Appeals expressed concern that a Board member can use the AWO procedure without having to explain why a case meets the AWO requirements. See Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). As a result, a court may not be able to tell whether the Board member fully reviewed the case and correctly applied the regulation. Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). The Court also recognized that this was not an abstract concern in light of the huge caseload faced by the Board. Id. The Court indicated it would likely consider the issue differently if there was evidence of misapplication of the AWO procedure by the Board, particularly evidence of systemic misuse of the procedure. Id. at 377.

Recently, the Fifth Circuit Court of Appeals has echoed the general concern regarding the flaws in the AWO

procedure. In Yuqing Zhu v. Ashcroft, 382 F.3d 521 (5th Cir., 2004), the Second Circuit vacated the BIA's use of AWO because court did not know if the BIA affirmed on a non-reviewable basis, i.e., untimeliness, or a reviewable basis, i.e., the merits of the asylum claim.

These concerns are clearly valid and discernable in practice when considering the amount of cases in which the AWO procedure is utilized. According to an investigation by the Los Angeles Times, 57% of the cases decided by the Board in October 2002 were affirmed without opinion. In total, individual Board members summarily affirmed 16,275 cases between March 1, 2002 and September 24, 2002. This increase in AWO decisions corresponds with an increase in denials; in October 2002, for example, the Board rejected 86% of its appeals, compared with 59% the previous October. See L. Getter and J. Peterson, Speedier Rate of Deportation Rulings Assailed, Los Angeles Times, January 5, 2003, at A-1.

In addition, the American Immigration Law Foundation has taken an informal study which indicates:

> that half of the decisions issued by the Board were AWO decision; this means that there may have been over 100 AWO decisions on any given day...under the new regulations, an even larger number of AWO decisions is likely, because the AWO process - which was discretionary - is now mandatory for all cases that satisfy the cirteria..Because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing every appeal to ensure that it meets all of the

requirements for an AWO decision[6]. See Kenney, Mary, How To Challenge An Affirmance Without Opinion By A BIA Member, <http://www.ailf.org /lac/lac_pa_100102.asp>, September 27, 2002 at 2.

These statistics clearly illustrate the sheer number of AWO cases and further reveal the likely possibility of gross and flagrant error put forth by the circuit courts as discussed above further stressing the importance of review in the instant case.

iii. EVEN THE GOVERNMENT, WHO ADVOCATED USED OF THE AWO PROCEDURE IN THE INSTANT CASE, HAS BEEN FORCED TO REALIZE THE PROCEDURE'S INVALID NATURE.

The government has moved to remand some federal court appeals for new Board decisions specifically because the

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[6] For example, in Farjardo v.INS, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"-and prejudicial - errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones. Similarly, in the precedent case Matter of Ramos, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally - and erroneously - used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, en banc, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

Board erred in using the AWO procedure in the case. See, e.g., Paz v. Bulger, No. 02-22024 (S.D. Fla. Dec. 5, 2002) (because the Board had erroneously used the AWO procedure, government requested remand so that a three-member panel of the Board could decide the appeal); Tapia-Rodriguez v. Ashcroft, No. 02-60660, motion to dismiss filed, (5th Cir. Feb. 5, 2003) (government moved to dismiss court appeal after Board sua sponte reopened case – upon government's request – because it had erred in using the AWO procedure); Sylla v. INS, No. 02-2915/03-1348 (3d Cir. Feb. 10, 2002) (government moved to remand case to the Board after petitioner and AILF challenged the AWO procedure).

Therefore, the Government has repeatedly questioned the validity of the very same procedure it advocates for in the instant case. At minimum, such conflict demonstrates the critical nature importance of this issue thus deserving of this Court's review.

iv. INVALIDATION OF THE AWO PROCEDURE AND REQUIREMENT OF THE BIA TO PUT FORTH A REASONED OPINION WOULD ALLEVIATE THE HEAVY CASE LOAD IN THE JUDICIAL CIRCUITS.

It is common knowledge for any practitioner in the federal court system that the federal courts are severely overworked based on an apparent inundation of petitioner for direct review filed by immigrants. (App. "F", *infra*, 29a-31a.) In that this inundation of new cases in the federal judiciary coincides with the AWO procedures' implementation is no coincidence. (App. "F", *infra*, 29a-31a.) Forcing the BIA to put forth reasoned opinions would clearly lessen the already-heavy burden on the federal courts and increase judicial economy.

Moreover, this sheer number of new filings demonstrates the burden the AWO procedures are placing on the federal courts in abdication of the BIA's statutory duties and in deprivation of an alien's Fifth Amendment right to due process.

III. THE BIA'S IGNORANCE OF PETITIONER'S EQUAL PROTECTION ARGUMENT SHOULD HAVE VESTED THE NINTH CIRCUIT WITH JURISDICTION PURSUANT TO THE REAL ID ACT OF 2005 WHICH DEMONSTRATES THE NINTH CIRCUIT'S DISMISSAL WAS WRONGLY DECIDED.

As described above, 8 U.S.C. § 1252(a)(2)(D), as amended by the REAL ID Act of 2005, 109 P.L. 13; 119 Stat. 231, Section 106(a) reads:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Here, Petitioner repeatedly argued before the BIA and Ninth Circuit that her equal protection rights were violated based on her initial arrest by immigration authorities. This argument was addressed by the IJ initially which demonstrated it had at minimum a meritorious basis. (App. "D", *infra*, 17a.) In fact, the IJ stated a constitutional question was *not* for the purview of the Immigration Court, but rather the higher courts of appeal. (App. "D", *infra*, 17a-18a.) Therefore, at minimum, the Ninth Circuit should have exercised jurisdiction over the petition for review based on the

existence of a valid equal protection argument in accordance with 8 U.S.C. § 1252(a)(2)(D). The decision dismissing for lack of jurisdiction thus was wrongly decided.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

December 18, 2006

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-72035

Agency No. A79-154-662

[Filed September 26, 2006]

HERMINIA AREVALOS-ALFARO, Petitioner,	)
v.	)
ALBERTO R. GONZALES, Attorney General, Respondent.	)

ORDER

Before: O'SCANNLAIN, GRABER and CLIFTON, Circuit Judges.

We have reviewed the opposition to the motion to dismiss this petition for review for lack of jurisdiction, and we conclude that petitioner has failed to raise a colorable constitutional or legal claim to invoke our jurisdiction over this petition for review. *See Ramirez-Perez v. Ashcroft*, 336

F.3d 1001 (9th Cir. 2003); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). Accordingly, respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Romero-Torres v. Ashcroft*, 327 F.3d 887, 892 (9th Cir. 2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002).

All other pending motions are denied as moot. The temporary stay of removal and voluntary departure confirmed by Ninth Circuit General Order 6.4(c) and *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004), shall continue in effect until issuance of the mandate.

DISMISSED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A79-154-662 - San Diego

[Filed March 27, 2006]

IN REMOVAL PROCEEDINGS	)
	)
In re: AREVALOS-ALFARO, HERMINIA	)
	)

ORDER

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8

C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ _____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File: A 79 154 662

[Filed June 22, 2005]

IN REMOVAL PROCEEDINGS	)
	)
In the Matter of	)
	)
HERMINIA AREVALOS ALFARO,	)
Respondent	)
	)

CHARGE: Section 212(a)(6)(A)(I) Immigration and Nationality Act (present without admission or parole).

APPLICATION: Cancellation of removal for nonpermanent residents; Voluntary departure at the conclusion of proceedings.

ORAL DECISION OF THE IMMIGRATION JUDGE

On March 31, 2003, this Court stated an oral decision relative to respondent's then applications for cancellation of removal for nonpermanent residents and for voluntary departure at the conclusion of proceedings. That decision is in the record of proceedings at Exhibit R1 and is incorporated herein by reference. In the original decision, this Court addressed the fact that since respondent's United States citizen child, Michael, was five years old (he was nine years old at the time of the proceedings in March of 2003), he had some medical problems consisting of sinus allergies and the Court noted the difficulties respondent and the child would face if respondent were forced to be removed to Mexico. The Court concluded after considering all of the evidence of record that respondent had failed to sustain her burden of proving the requisite exceptional and extremely unusual hardship to her United States citizen child, should she be removed. Respondent thereupon appealed to the Board of Immigration Appeals and the Board, without opinion, affirmed my decision on May 25, 2004 (*See* Exhibit R4).

Respondent then moved on August 20, 2004 to reopen proceedings, claiming newly discovered facts and a change in circumstances relating to the medical condition of the United States citizen child, now 11 years so. More specifically, the respondent's attorney represented to the Board of Immigration Appeals that the child has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), referring to a letter dated August 9, 2004 from Dr. Dolores Rodriguez Reimann and certain attentions and thereto (*See* Exhibit R5).

By order dated September 28, 2004 (Exhibit R6), the Board of Immigration Appeals remanded the case to this Court in view of the medical developments in India the fact

that the child's "learning difficulties had prevented him from an instance of the sixth grade this year." *ID*.

Since the case was remanded to the Court, respondent has submitted to this Court a letter from Dr. Rodriguez dated November 23, 2004 (*See* Exhibit R8), wherein she states in part that "because of good medication monitoring, consistent follow-through by Michael's mother with the school staff, and consistency with his therapy sessions, Michael's difficulties both at home and at school have generally decreased. In accordance with Michael's treatment plan, both he and his mother have worked closely with his pediatrician to ensure proper medication management. By all accounts, Michael continues to do well with Ritalin (5 milligrams). According to Michael's mother, both she and Michael have been able to work effectively with staff at Michael's school to assess and monitor academic and behavioral gains." The letter went on to state "Our own psychotherapy has consisted of helping Michael developed a clearer age-appropriate sense of behavioral consequences for his choices, both at home and school. In addition, discussions on parenting with both Michael and his mother have helped them negotiate better communication and boundaries with each other. Michael's mother does, however, continue to experience some struggles in her current marital relationship. It is primarily when she and current husband have difficulties that Michael becomes frustrated and helpless in either withdraws or acts out defiantly by refusing to listen or follow rules set by the adults in his life." Furthermore, in Dr. Rodriguez went on to state in this letter "Overall, I believe Michael's mother has pursued, and continues to pursue, reasonable avenues available to her in order to best assist her son (Michael) to overcome his difficulties and become a successful 11-year-old. I believe it important that Michael's present support system and professional services remain stable and consistent

so that the gains he has made can be sustained and increased. It is my further opinion that a disruption in this support system would be detrimental to Michael's welfare."

Respondent has also submitted to the Court a note at Exhibit R8, which apparently indicates the child has moderate to severe ADHD, or the prognosis for which is lifelong.

Respondent also submitted a letter (Exhibit 9) from Dr. Carolyn Quintero, a pediatrician, confirming the ADHD diagnosis, noting that the boy has done well with therapy and that he needs further valuation and therapy. The letter also opines (without foundation) that the medical attention the boys receiving couldn't "be duplicated in Mexico at this time".

Respondent has also submitted proof (Group Exhibit II) of the child's "below basic" scores on the California standards tests, a letter from a teacher, Angelina Garcia, noting the child's progress and improvement when he takes his medication, and a student proficiency level report, some prescriptions and a letter from the child indicating essentially that he hates "going to Mexico" and would be sad if his mother were removed.

Finally respondent submitted proof at Exhibits 12 and 13 that the marriage into which she entered on October 30, 2004 to Antonio Zamudio was dissolved by court order, dated May 13, 2005.

Respondent has testified before the Court on this date and her testimony, in essence, indicates that since the time of the last hearing, her son, Michael, has been diagnosed with ADHD, a disorder of the brain which according to her causes a lack of control, hyperactivity and depression. She said that her son began receiving special attention in July 2004 a

teacher saw that the boy was unable to learn or study. He was required to repeat his fifth year of school instead of being promoted. Respondent stated that with medication and treatment her son has improved and is more subject to control at this time. He takes two medications to assist him. He takes Adderall (25 milligrams) to improve his learning ability and focus and Strattera (25 grams) to relax and calm him. It is her understanding the boy will be required to take these medications for the rest of his life. She indicated he no longer takes Ritalin, although there is some confusion because when later questioned as to her knowledge of what Ritalin was, the respondent seemed to indicate that she did not know what it was.

She testified that when the boy doesn't take his medication he's very uneasy and does inappropriate things, such as tearing his shirt. Respondent has had to pay on occasion for the Strattera medication, which costs $125 for 30 pills. The boy uses one pill per day. On three occasions she has had to pay for this Strattera. On other occasions Medi-Cal has paid for this medication. She has received coupons from the clinic where her child has attended an order for her to obtain the Adderall, which normally costs $122 for 30 pills, one pill per day.

Respondent was questioned about earnings of people in Mexico and noted that she has a son or son's working in fields of Mexico earning 600 pesos per week, the equivalent of $40 per week.

Respondent states that she administers the medicine to her child, which medicine is good for up to 12 hours at a time. She also gives him special attention taking him to and from school so he won't, for example, buy candies or other sweets which make him hyperactive and cause him to lose control.

She gives him medication whenever she sees signs that the medication is wearing off.

Respondent was questioned about the contact her child has with his natural father and she said that he sees his father once per month. She says that the father would not take the boy and if she were to be removed from the United States because her father doesn't want the care of the boy because of his illness.

Respondent noted that she was recently married in October 2003, but that during the course of the marriage there were many conflicts between her then husband and the boy whenever the boy would act up. Ultimately, she and her husband were divorced, as earlier noted. At school respondent noted that her son, Michael, has special classes wherein he is given extra help for two hours per day and he also sees a psychologist every two weeks, during which such as the psychologist talks about the boy studies and future goes.

On questioning by her attorney, respondent stated that she does not know if are such classes available in Mexico.

On cross-examination by the trial attorney, respondent noted that some of the problems encountered by her child appeared to relate to the fact that respondent and the child had moved in with respondent's new husband, approximately than 70 years old, in relatively cramped conditions in a one-bedroom apartment. Respondent conceded that since she separated from that husband and since she and her son moved out, things for the son have improved significantly.

Respondent noted that since the time of the last hearing there have been certain other changes in their lives. At the time of the last hearing before this Court in 2003, respondent had two other children living with her, a daughter and son.

Respondent and her United States citizen's son, Michael, have moved in with the daughter, while the other son, Rigoberto, now 17, has returned to his native Mexico since he did not like living in the United States.

As to the fact that at the time of the last hearing respondent had stated that her son, Michael, visited with his father weekly for at least the last three years, the record now reflects that the child visits far less frequently with the father. Respondent conceded that the visits diminished when she married Antonio Zamudio.

Respondent also advise the Court on questioning that she noticed respondent's problems as early as kindergarten and she also noticed that the boy began to have troubles in school in the second grade.

Respondent has additionally conceded on examination by counsel for the Government that there are doctors and pharmacies in Mexico that are available. She further indicates, differently from the last hearing, that if forced to return to Mexico, she would take her son with her. At the time of the last hearing, she presented to this Court a letter from an uncle, indicating in essence, that he would be willing to support the child here in the United States completely until the child turned 21. Respondent advises that that uncle is now living in Mexico.

Finally, respondent emphasized her belief that there are no programs in Mexico to give poor people medical help, noting that 21 years ago one of her sons died because she was unable to afford the proper treatment. She did concede, however, that she has no significant present knowledge as to the availability of medical treatment and medication in Mexico.

To some extent the Court is baffled by this case. Respondent tells the Court today that the child's behavioral problems began in second grade and have affected him since. This is very different from the picture that was painted before the Court when it heard this case in 2003, when the Court was presented with several certificates indicating that the boy had achieved several periods of perfect attendance in school, certificates for an arriving on time, certificates for perfect homework and certificates for being on the honor roll. Although respondent claims that she saw behavioral problems with the son, the only problem she mentioned at the time of the last hearing was a sinus allergy. Respondent concedes that the child has no problem with sinuses at this time and has taken no medication regarding that problem since at least July of 2004.

This Court notes that marital stress between respondent and her husband from whom she is now divorced, appeared to have been at least one of the factors exacerbating the child's ADHD condition. This factor has been eliminated by the divorce and separation from Antonio Zamudio and that has alleviated some of the problems. The respondent admits that things have improved in her child is happier.

The Court notes that although it sympathizes with the child's medical condition, there has been no adequate or convincing showing that medication and medical treatment would be unavailable in Mexico if respondent were returned there, notwithstanding the conclusory and unfounded statements of Dr. Quintero in her letter to this Court. Dr. Quintero was not presented for cross-examination before this Court. Respondent herself admits that she has done nothing to check out the availability of medical treatment and medication in Mexico and she has taken no steps apparently to determine whether or not there would be special classes available to her

son in Mexico. As earlier noted, some things have changed in life of respondent and her son. At the time of the last hearing respondent's son, Rigoberto, was living here in the United States, but he has returned to Mexico. In fact, the record reflects that Michael has 10 half siblings living in Mexico and only one living here in the United States. The one living in the United States is living here illegally.

As to financial difficulties that respondent may face in Mexico, the record reflects that she is earning very minimum wages or salary here in the United States. To the extent that she seeks to convince this Court that she would be unable to provide medication and medical treatment to her son in Mexico, the record reflects that the uncle who, at the time of the last hearing, valid to this court in an affidavit that he would support respondent's U.S. citizen child until he was 21 years of age, is in Mexico at this time. If respondent is forced to return to Mexico, this uncle would no doubt still be willing and able to assist financially.

Whether considered individually or in conjunction with all of the factors previously considered by this Court in its original decision, I do not conclude that respondent yet has made adequate showing that her enforced departure from the United States would result in exceptional and extremely unusual hardship to her United States citizen son.

I conclude that respondent has failed to sustain her burden of establishing that she is eligible statutorily for cancellation of removal. Her application for that relief must, therefore, been denied.

Although the Board of Immigration Appeals apparently remanded this case only for the Court's consideration of the cancellation application, this Court will, to the extent that it

is authorized by law, again grant respondent the privilege of voluntary departure, such departure to occur on or before August 22, 2005.

ORDER

IT IS HEREBY ORDERED in respondent's application for cancellation of removal for certain non-permanent residents be and the same is hereby denied.

IT IS FURTHER ORDERED to respond be granted, in lieu of an order of removal, the privilege of depriving the United States voluntarily at her own expense, such departure to occur on or before August 22, 2005.

IT IS FURTHER ORDERED that should respondent failed to timely depart the United States, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and respondent shall thereupon be ordered removed from the United States to Mexico on the basis of the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that as a condition to this grant of voluntary departure, respondent must post a voluntary departure bond in the sum of $500 with the District Director for the Department of Homeland Security no later than the close of business on June 29, 2005.

IT IS FURTHER ORDERED that should respondent fail to timely post said bond, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and

respondent shall thereupon be ordered removed from the United States to Mexico on the basis of the charge contained in the Notice to Appear.

/s/_____
KENNETH A. BAGLEY
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File: A 79 154 662

[Filed September 5, 2002]

IN REMOVAL PROCEEDINGS	)
	)
In the Matter of	)
	)
HERMINIA AREVALOS ALFARO,	)
Respondent	)
	)

CHARGE: Section 212(a)(6)(A)(I) Immigration and Nationality Act (present without admission or parole).

APPLICATION: Motion to terminate.

INTERIM DECISION AND ORDER
OF THE IMMIGRATION JUDGE

On June 10, 2002, the Immigration and Naturalization Service (Service) issued to the respondent a Notice to Appear (NTA) (Form I-862) (Exhibit 1) charging her with

removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (Act) for being present without having been admitted or paroled. The Service alleges that she is a native and citizen of Mexico who arrived in the Untied States at or near San Ysidro, California on or about October 18, 1991 and was not then admitted or paroled after inspection by an immigration officer. The charging documents were filed with the San Diego Immigration Court on June 19, 2002, thereby vesting this Court with jurisdiction. *See* 8 C.F.R. § 3.14(a) (2002).

On August 16, 2002, the respondent appeared, with counsel, for her scheduled hearing. She admitted to the truth of all of the factual allegations, conceded removability, and indicated that she would seek relief in the form of terminating proceedings, cancellation of removal for certain nonpermanent residents, and alternatively, post conclusion voluntary departure. The Court continued the hearing until September 19, 2002 and directed the respondent to file a motion to terminate no later than September 6, 2002.

On August 23, 2002, the respondent, through counsel, filed a motion to terminate. She asserts that she was cited for possession of a shopping cart by the police who then called the Border Patrol which led to her being place in proceedings. She argues that her arrest was based on her race which violated her equal protection rights.

On August 28, 2002, the Service filed an opposition to the respondent's motion in which it argues that Immigration Court is not the proper forum for a constitutional challenge citing *Matter of C.* 20 I&N Dec. 529 (BIA 1992); section 103 of the Act; 8 C.F.R. § 3.1 (1992); *Bagues-Valles v. INS,* 779 F.2d 483 (9the Cir. 1985); and *Matter of Cortez,* 16 I&N Dec. 289 (BIA 1977).

The respondent argues that removal proceedings against her are unconstitutional. The case law is clear that this Court is not authorized to issue decisions regarding the constitutionality of the Act and regulations it administers. *See Matter of Fuentes-Campos,* 21 I&N Dec. 905 (BIA 1997). Furthermore, the respondent has already admitted to the truth of all of the allegations and conceded removability. As such, her motion to terminate proceedings is denied.

SO ORDERED:

/s/ _____
KENNETH A. BAGLEY
U.S. Immigration Judge

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041
Decision of the Board of Immigration Appeals

File: A79-154-662 - San Diego

[Filed September 28, 2004]

IN REMOVAL PROCEEDINGS	)
	)
In re: HERMINIA AREVALOS-ALFARO,	)
	)

MOTION

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]-Arrived at a time, or place not designated by the Attorney General

This matter was last before the Board on May 25, 2004, at which time we summarily affirmed the March 31, 2003, decision of the Immigration Judge denying the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229b(b). The respondent has filed a timely motion to reopen for consideration of additional evidence. The

Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not filed a response to the motion, and we therefore deem it unopposed. *See* 8 C.F.R. § 1003.2(g)(3). The motion will be granted.

The respondent seeks to reopen based on new evidence that her United States citizen son has learning difficulties. The respondent provided evidence that her son was recently diagnosed with attention deficit hyperactivity disorder and was given a treatment plan of medication and therapy. The respondent also provided evidence that her son's learning difficulties have prevented him from advancing to the 6th grade this year. Given that these developments are recent, could not have been presented at the prior hearing, and are material to the respondent's application for cancellation of removal, and the DHS has not filed an opposition to the motion, we find that a remand for further consideration of the Immigration Judge's decision on cancellation of removal is warranted. *See* 8 C.F.R. § 1003.2(c).

Accordingly, the motion to remand is granted.

ORDER: The motion to remand is granted, and the record is remanded to the Immigration Judge for, further proceedings consistent with the foregoing opinion.

/s/_____
FOR THE BOARD

APPENDIX F

Testimony at Hearing on "Strengthening Interior Enforcement: Deportation and Related Issues" (4/14/2005)

Before the Subcommittee on Immigration, Border Security and Citizenship and the Subcommittee on Terrorism, Technology and Homeland Security of the Senate Committee on the Judiciary

Submitted by

Lee Gelernt
Senior Staff Counsel, ACLU Immigrants' Rights Project
and
Lucas Guttentag
Director, ACLU Immigrants' Rights Project

Chairman Cornyn and Kyl, Ranking Members Kennedy and Feinstein and Members of the Subcommittees of the Senate Judiciary Committee:

On behalf of the American Civil Liberties Union and more than 400,000 members dedicated to defending the Constitution and its promise of fair process for all persons, including immigrants, I welcome this opportunity to present the ACLU's views at this important hearing.

The hearing covers a number of critical issues. We will not attempt to address all of them in our testimony today. Instead, our testimony will focus on the role of the courts in

immigration cases, and in particular, on the issues raised by the Supreme Court's decision in St. Cyr, which rejected the Justice Department's sweeping claim that the Writ of Habeas Corpus had been repealed in 1996 and was therefore no longer available to immigrants challenging their deportation.[1]

Our testimony makes two points. First, we hope to convey a sense of the complexity and far-reaching importance of the issues raised by the St. Cyr decision. Indeed, as we explain, the issues in St. Cyr transcend the immigration field and go to the very heart of who we are as a country, a country which can now count more than two centuries of unwavering commitment to the rule of law and to the Great Writ of Habeas Corpus.

In light of the complexity and historic importance of the issues, any legislation by the Congress in this area will necessarily raise profound constitutional questions, as well as difficult issues of immigration policy and court administration. We thus respectfully urge Congress to give any new proposals in this area the most careful and deliberate consideration and to dismiss out of hand any proposals that would eliminate habeas corpus for immigrants facing detention or deportation. No Congress in the history of this country has ever eliminated habeas corpus for immigrants facing deportation, and this Congress should likewise reject any proposal that would take that extraordinary step.

Secondly, we will explain why the attacks that have been leveled against the St. Cyr decision are misplaced. Insofar as there are concerns about the increased number of immigration cases in the courts, those concerns are, in our view, more

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[1] INS v. St. Cyr, 533 U.S. 289 (2001).

appropriately directed at the Attorney General's 2002 decision to eliminate any meaningful oversight role by the Board of Immigration Appeals (BIA), a decision which has shifted much of the burden to the courts and left the Judiciary with the task of providing the only real check on erroneous decisions made by immigration judges.

I. St. Cyr and The Historic Role of Habeas Corpus in Deportation Cases.

At one level, the St. Cyr decision was about immigrants and immigration law. But that narrow characterization would not fully capture what was at stake in St. Cyr. Fundamentally, St. Cyr was about the history of judicial review in the United States and the indispensable role played by the federal courts in safeguarding the rights of all persons, including the most vulnerable and politically powerless among us. In particular, St. Cyr explained the history of the Great Writ of Habeas Corpus, which has, from its English origins to modern times, guaranteed the right to go to court to test the legality of the government's actions for any individual threatened with a deprivation of his or her liberty.

The Great Writ has been described as "the most important human right in the Constitution."[2] Indeed the Framers of the Constitution included few protections in the original document that specifically protected individual rights, but they did include the right to habeas corpus.[3]

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[2] Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143 (1952).

[3] See U.S. CONST., Art. I, § 9, cl. 2 (the "Suspension Clause").

The St. Cyr case itself involved a longtime, lawful permanent resident who was ordered removed on the basis of a criminal conviction. It was undisputed that prior to the passage of the 1996 amendments to the Immigration Act, an immigration judge could have granted Mr. St. Cyr a waiver of deportation based on his significant ties to this country. At the urging of the Justice Department, however, the BIA took the position that the 1996 amendments should be construed to have retroactively eliminated the possibility of a waiver for Mr. St. Cyr, making his removal mandatory.

According to the BIA, deportation was now mandatory in hundreds of cases like Mr. St. Cyr's - regardless of how long ago the conviction occurred or any of the immigrant's other equities. Even relatively minor crimes would trigger mandatory deportation. As a result, an immigrant with a decades-old, non-violent conviction would be subject to automatic deportation - even if, for example, the immigrant had a U.S. Citizen spouse and child, had come to this country at a very young age, and had never again had any involvement with the law.

Even more fundamentally, the Justice Department took the remarkable position that no court could review whether the BIA had properly construed the 1996 amendments to apply retroactively. In the Justice Department's view, Congress had stripped the federal courts of their power - including by Habeas Corpus - to review whether the BIA's legal rulings were consistent with the governing statutes enacted by Congress.

Thus, even if the BIA had incorrectly concluded that Congress never intended to retroactively institute a mandatory deportation scheme, no court had the power to enforce the law and stop Mr. St. Cyr's deportation or any of the hundreds of

other illegal mandatory deportations. The only review that would be available was by administrative judges - immigration judges and the BIA. Yet a process confined to the Executive Branch has never satisfied the fundamental tenets of judicial review and plainly cannot displace the guarantee of habeas corpus.

The issues before the Supreme Court in St. Cyr were thus grave, with far-reaching practical and symbolic importance. Had the Justice Department's jurisdictional position prevailed, it would have been the first time in which an immigrant could be deported without any court reviewing the legal validity of the deportation order, even by habeas corpus.

The Supreme Court ultimately held in June 2001 that (1) the courts retained their historic habeas jurisdiction to review deportation orders, and (2) the Justice Department and BIA were wrong in interpreting the 1996 amendments to apply retroactively.

There are at least three overarching points about the Supreme Court's decision that are worth emphasizing.

First, the Court left no doubt that review of deportation orders is constitutionally required, and in particular, that the Suspension Clause of the Constitution guarantees the right to habeas corpus review. Thus, the Court put to rest any notion that immigrants in general, or immigrants with criminal convictions in particular, had no right to habeas corpus.[4]

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[4] See, e.g., St. Cyr, 533 U.S. at 300 (noting that review in deportation cases "is unquestionably required by the Constitution" because of the Suspension Clause) (internal quotes and citations omitted). The Court concluded that Congress had not repealed habeas corpus and that there was therefore no need for it to address

Second, the Court emphasized that the right to habeas corpus was grounded in hundreds of years of unbroken practice and tradition in the United States and England, and that this practice and tradition applied equally to citizens and non-citizens. In particular, the Court traced the history of immigration law in this country and showed that there has never been a time when an immigrant could be deported based solely on the say-so of an administrative official. As the Court made clear, habeas corpus has always been available for immigrants as the ultimate safeguard against an unlawful deprivation of liberty.[5]

Indeed, the Court stressed that the use of habeas corpus to test the legality of a deportation order fell within the original "core" purpose of the Writ because it involved a challenge to Executive detention. In contrast, the Court noted that the use of habeas corpus in post-conviction criminal cases involves detention ordered by a court after a full trial, where habeas would not be the only review a defendant received.[6]

Finally, St. Cyr illustrates a more general point about judicial review and the role played by courts in the immigration system, namely that oversight is critical to the proper functioning of a fair system. Judicial review may seem at times like a technical, abstract concept. But, in practice, the

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the grave and far-reaching constitutional problems that would have been triggered by the elimination of all review, including habeas review. Id. at 304-05.

[5] St. Cyr, 533 U.S. at 305-07 (noting that if habeas is no longer available it "would represent a departure from historical practice in immigration law").

[6] St. Cyr, 533 U.S. at 300-02.

courts play an indispensable role in enforcing the rule of law and preventing grave instances of injustice that would otherwise profoundly and inalterably change the lives of countless immigrant families.

Indeed, but for the Court's decision to review Mr. St. Cyr's case, he and hundreds of other longtime residents would have been deported pursuant to unlawful deportation orders, banishing them and their families from the United States, where they may have lived since they were small children. At the end of the day, it is critical that the lives of these individuals not be lost in a blur of aggregate statistics and policy arguments.

Jerry Arias-Agramonte is one of the people who would have been erroneously deported in the absence of habeas. He came to this country as a teenager in 1967, as a lawful permanent resident. He has United States citizen parents and siblings, and six United States citizen children, one of whom served in the military. In 1977, Mr. Arias-Agramonte pled guilty to a New York State controlled substance offense in the fifth degree, for which he received a sentence of probation. On the basis of this nearly 20-year old conviction he was placed into removal proceedings and subject to mandatory deportation under the BIA's retroactivity ruling. The district court reversed the retroactivity ruling and granted him the right to seek a waiver of deportation before an immigration judge based on his family ties, long residence and gainful employment. An Immigration Judge subsequently granted the waiver. In the absence of habeas, Mr. Arias-Agramonte

would have been mandatorily and unlawfully deported from a country in which he had lived since 1967.[7]

Ironically, it is often immigrants who most appreciate the true meaning of judicial review. For many immigrants, it is the very right to go before a neutral judge that, in their minds, differentiates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago--that "[t]he history of American freedom is, in no small measure, the history of procedure."[8] And no procedure has been more integral to preserving freedom in this country over the past two hundred years than the Great Writ of Habeas Corpus.

In short, St. Cyr makes clear that immigrants may not be deported without access to the courts, based solely on the word of an administrative judge. At a minimum, habeas corpus must be available to test the legal validity of the deportation order - a right that no Congress has ever taken away.

II. The Attacks on St. Cyr and Habeas Corpus Are Misplaced.

Some have suggested that the current judicial review scheme must be revised. Two particular objections are commonly heard.

First, some have suggested that the federal courts are being overloaded with immigration cases and that St. Cyr and

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[7] Arias-Agramonte v. INS, 2000 WL 1059678 (S.D.N.Y. 2000).

[8] Malinski v. New York, 324 U.S. 401, 414 (1945).

habeas review are to blame. But habeas cases challenging removal orders are not the problem.

The real increase in immigration cases is due to the greatly increased number of "petitions for review" filed directly in the courts of appeals.[9] And, critically, that increase has coincided with the BIA "streamlining" reforms put into place by the Attorney General in 2002 - reforms that have resulted in a manifold increase in the number of orders issued by the BIA by effectively gutting the administrative review process and thereby shifting the burden to the circuit courts to undertake the only meaningful appellate review of immigration judge decisions.[10]

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[9] Prior to the implementation of the streamlining regulations, federal appeals courts were receiving approximately 1,500 BIA appeals per year. U.S. Department of Justice, Fact Sheet, "BIA Restructuring and Streamlining Procedures," (Dec. 8, 2004). See also Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals," at 4 (noting that there were more than 8,500 BIA appeals filed in the circuit courts in 2003, up from approximately 1,600 in 2001, before the BIA reforms went into place).

[10] A number of detailed reports on the BIA reforms have documented that the increase in appeals to the circuits has coincided with the BIA reforms, a point even the government has acknowledged. See, supra, U.S. Department of Justice, Fact Sheet; Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals"; see also Dorsey & Whitney LLP, Study Conducted for The American Bar Association, "Board of Immigration Appeals: Procedural Reforms to Improve Case Management," July 22, 2003.

Among other things, the Attorney General's reforms (1) cut by almost one-half the total number of Board members; (2) expanded the number of cases that will now be reviewed by a single Board member, rather than a three-judge panel; and (3) expanded the number of cases that will be decided on the basis of one-line "AWO" orders, which state only that the immigration judge's decision has been Affirmed Without Opinion. As a result, there is no longer meaningful administrative appellate review, with reasoned decisions from appellate panels. Rather, the BIA now simply churns out unexplained, one-line decisions at an unprecedented rate, with the circuit courts getting thousands of new cases each year.[11]

Thus, insofar as the aggregate number of immigration cases is perceived as a problem, the solution is not to attack the St. Cyr decision. Congress should mandate, among other things, that the Attorney General re-institute a meaningful

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[11] The reforms have resulted in the BIA deciding thousands more cases each year, meaning that there are that many more cases each year that can be appealed to the circuits. See, e.g., U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 Statistical Yearbook at S2 (showing that in 2001 the BIA decided approximately 27,000 cases on appeal from Immigration Judges, but more than 46,000 cases in 2003, after the 2002 BIA reforms went into place). Moreover, not only did the aggregate number of BIA decisions increase dramatically in light of the 2002 reforms, but the rate at which immigrants appeal BIA decisions to the circuit courts has increased, see, e.g., DOJ Fact Sheet, supra, suggesting that the increased number of appeals to the circuits is likely also due to dissatisfaction by immigrants with the lack of a reasoned, considered decision by the BIA. See also Dorsey & Whitney ABA Report, supra n. 9, at 39 ("because the BIA backlog reduction is achieved by depriving aliens of meaningful agency review, aliens are seeking meaningful review in the federal circuit courts"); see also id. at 40.

administrative appellate process before the BIA. Doing so will prevent the BIA from simply shifting the responsibility to the courts to provide the only meaningful review of immigration judge decisions.

The second commonly heard objection to St. Cyr is that immigrants with criminal convictions are now getting "two bites at the apple," while non-criminals receive only one bite. By this, detractors apparently mean that non-criminals must begin the review process in the court of appeals, but immigrants with criminal convictions get two bites because they start in the district court in habeas and can then appeal an adverse habeas decision to the circuit (the so-called extra bite at the apple, which, incidentally, the government gets as well).

But it is misleading to suggest that immigrants with criminal convictions get more review than non-criminals. In fact, they get less review. The reason is that the 1996 court-stripping provisions significantly restrict the types of claims that they can bring to the courts - in habeas or otherwise. Thus, the review they receive in federal court, from both the district and circuit courts, is not as searching as that received by non-criminals.[12]

In any event, Congress is free to return to the pre-1996 scheme and make the courts of appeals the primary forum for review for all immigrants, criminal and non-criminal. But if Congress chooses to return to the pre-1996 scheme and make the circuits the primary forum for review, it must also do both of the following:

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[12] St. Cyr, 533 U.S. at 314 n.38 (noting limitations on "scope" of habeas review for immigrants with criminal convictions).

(i) ensure that all immigrants, including those with criminal convictions, receive the constitutionally-required one bite at the apple in the circuit court, which cannot happen under the current system due to the 1996 court-stripping amendments. This means that the circuit courts must be able to meaningful review the legal validity of the deportation order for consistency with the Constitution and governing statutes and regulations. In other words, the circuit courts must be able to review constitutional claims and all questions of law, including the application of law to fact (so-called "mixed" questions of law).[13]

(ii) retain habeas corpus review as the ultimate safeguard for cases where the immigrant cannot obtain review in the circuit court and manifest injustice would occur in the absence of habeas review, such as in cases where an unscrupulous or negligent lawyer fails to file a petition for review in the circuit court within the required 30 days, or the immigrant does not receive proper notice of the BIA's decision. In other words, habeas corpus in the district courts need not be the primary avenue of review to challenge a deportation order, but it must remain as a backstop to prevent miscarriages of justice - as it has always done at every point in our Nation's history.

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[13] St. Cyr, 533 U.S. at 302 (noting that historically habeas covered all questions of law including the "erroneous application or interpretation of statutes") (emphasis added). There is no basis in the Constitution or in historical habeas practice for limiting review to "pure" questions of law. Moreover, any attempt to differentiate between types of legal questions (i.e., "pure" as opposed to "mixed" legal questions) will inevitably create years of unnecessary litigation over the elusive line separating the various categories.

Insofar as there are proposals to respond to St. Cyr that do not contain both of these features, they are deficient. Habeas review must be retained and all immigrants must receive one full bite at the apple (i.e., review of constitutional claims and all other legal claims, not just "pure" questions of law).[14]

In short, Congress has options. We stand ready to work with Congress on preserving full court review while accommodating the government's interest in channeling more immigration appeals directly to the circuit courts of appeals, if that is thought desirable. But one option that is not available is the repeal of habeas corpus and no option should be considered without careful and deliberate review in light of the enormous stakes.

Of course, the ACLU recognizes the authority of Congress to regulate immigration and entry into the United States. That is not the issue. Our point today is that the process for determining who is subject to removal must be fair and efficient to ensure that immigrants who have a right to remain are not deported erroneously and that the removal system is subject to judicial scrutiny.

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[14] There are many ways in which Congress can restore meaningful direct review in the courts of appeals for all immigrants, including by repealing the jurisdictional bar added to the Immigration Act in INA § 242 (a)(2)(c), 8 U.S.C. § 1252 (a)(2)(c). Insofar as there are proposals to amend INA § 242 (a)(2)(c) to restore review of only "constitutional" claims and "pure" questions of law, those proposals are deficient because they fail to restore review of mixed questions of law and fact (i.e., the application of law to fact); they are also deficient if they fail to protect habeas as a safety net. See, supra, n.12.

CONCLUSION

The history of immigration in the United States is a long and complicated one. What is striking is that at no time did any Congress ever take the extraordinary step of repealing habeas corpus for immigrants facing deportation. This unbroken tradition must be preserved. It is a tradition that powerfully demonstrates our Nation's historic and unwavering commitment to the rule of law.